MONTANA EIGHTEENTH JUDICIAL DISTRICT COURT, GALLATIN COUNTY

DIANE BRANDENBURG, et al, Plaintiffs, vs. KATHRYN BORGENICHT, M.D., Defendant.	Cause No. DV 07-871C Hon. John C. Brown **ORDER RE PLAINTIFFS' MOTIONS FOR PARTIAL SUMMARY JUDGMENT**

INTRODUCTION

Pending before this Court are Plaintiffs' three motions for partial summary judgment on (1) the issue of Defendant Kathryn Borgenicht, M.D.'s liability for medical neglect; (2) the inapplicability of Defendant's affirmative defense of contribution; and (3) Defendant's inability to claim a reduction — via either *pro tanto*, or apportionment — of any Plaintiffs' verdict. The motions were fully briefed, and this Court heard oral arguments on October 20, 2011.

At the conclusion of the hearing, the Court asked each party if there was anything else they would like to present, and each party affirmed there was not. Neither party indicated that there was any additional evidence they wished to submit as summary judgment evidence, and neither party indicated that there was any such evidence "on file" with the court. *See generally Hopkins v. Superior Metal Workings Systems, L.L.C.*, 2009 MT 48, ¶¶ 7, 14, 349 Mont. 292, 203 P.3d 803. Nor did either party request additional time for briefing, request relief under Rule 56(f), M.R.Civ.P., or request a continuance on the hearing.

Based upon the parties' briefs and competent summary judgment evidence attached thereto, including affidavits, as well as the entire court record, the Court now issues the following ruling.

ANALYSIS

I. Summary Judgment Standard.

Summary judgment is appropriate only when there is a complete absence of genuine issues of material fact and the moving party is entitled to judgment as a matter of law. *See* Rule 56(c), M.R.Civ.P.; *see Saucier v. McDonald's Rests. of Mont., Inc.*, 2008 MT 63, ¶ 33, 342 Mont. 29, 179 P.3d 481. To determine whether genuine issues of material fact exist, the court considers "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any." Rule 56(c), M.R.Civ.P. All evidence must be viewed in the light most favorable to the non-moving party, and all reasonable inferences that may be drawn from the evidence must be drawn in favor of the opposing party. *Saucier*, ¶ 33 (citing *LaTray v. City of Havre*, 2000 MT 119, ¶ 15, 299 Mont. 449, 999 P.2d 1010).

"The party seeking summary judgment bears the initial burden of establishing a complete absence of genuine issues of material fact." *Saucier*, ¶ 34 (citing *LaTray*, ¶ 14). To satisfy this initial burden, the moving party must "exclude any real doubt as to the existence of any genuine issue of material fact" by making a "clear showing as to what the truth is." *Toombs v. Getter Trucking, Inc.*, 256 Mont. 282, 284, 846 P.2d 265, 266 (1993). When the moving party alleges there are no genuine issues of material fact and that he is entitled to judgment as a matter of law, the burden shifts to the non-moving party to demonstrate that there are genuine issues of material fact. *Gwynn v. Cummins*, 2006 MT 239, ¶ 11, 333 Mont. 522, 144 P. 3d 82. The non-moving party must prove, by more than mere denials, speculation or conclusory statements, that a

genuine issue of material fact does exist. *See* Rule 56(e), M.R.Civ.P.; *see Gwynn*, ¶ 11; *see Saucier*, ¶ 34 (citing *LaTray*, ¶ 14). "Finally, if no genuine issues of material fact exist, it must then be determined whether the facts actually entitle the moving party to judgment as a matter of law." *Saucier*, ¶ 34 (citing Rule 56(c), M.R.Civ.P.).

II. Defendant's Affirmative Defense of Contribution.

In her June 14, 2010 Answer, Dr. Borgenicht raised contribution as her third affirmative defense:

> This Defendant has the right of contribution from any other person, including persons who have settled with or who have been released by Plaintiffs, whose negligence may have contributed as a proximate cause to the injury claimed of by Plaintiffs should they recover against this Defendant as provided by § 27-1-703, M.C.A.

Dr. Borgenicht's Ans. to Amend. Compl. at 2, Affirmative Defense 3 (June 14, 2010).

Plaintiffs moved for partial summary judgment on the ground that Dr. Borgenicht could not make a claim for contribution against Evergreen under § 27-1-703(1), MCA, because any such right had been extinguished by Evergreen's settlement. In response, Dr. Borgenicht agrees that Evergreen is a settled party and thus is not liable to contribute any money if there is a verdict for Plaintiffs. Dr. Borgenicht clarifies that her affirmative defense is not based on the provisions for contribution of money under § 27-1-703(1), MCA, but is based on § 27-1-703(4), MCA, which allows the jury to consider and apportion negligence to a settled party.

Thus, it is undisputed that Dr. Borgenicht is not entitled to contribution under § 27-1-703(1), MCA. Plaintiffs' Motion as it pertains to the issue of whether Evergreen is potentially liable to contribute any money towards a verdict, if one is rendered against Dr. Borgenicht, under § 27-1-703(1), MCA, is GRANTED. To the extent Plaintiffs' Motion could be construed as requesting dismissal of Dr. Borgenicht's third affirmative defense as it pertains to the

apportionment of negligence and liability by the jury under § 27-1-703(4), MCA, is DENIED.

III. Liability For Medical Neglect.

A. Applicable Law.

In Montana, the only way that a party can prove or disprove that a physician is legally responsible for injuries arising from her medical malpractice is through expert witness testimony. *See Collins v. Itoh*, 160 Mont. 461, 470, 503 P.2d 36, 41 (1972), and its progeny, *e.g. Estate of Nielsen v. Pardis*, 265 Mont. 470, 473, 878 P.2d 234 (1994); *Montana Deaconess Hospital v. Gratton*, 169 Mont. 185, 190, 545 P.2d 670 (1976); *see also Butler v. Domin*, 2000 MT 312, ¶ 21, 302 Mont. 452, 15 P.3d 1189. The expert witness testimony must provide the standard of care, *Romans v. Lusin*, 2000 MT 84, ¶ 23, 299 Mont. 182, 997 P.2d 114, and the departure from that standard. *Butler*, ¶ 21.

A specialist such as the Defendant, Dr. Borgenicht, who holds herself out as a geriatric specialist, is bound to exercise the degree of skill and knowledge that is ordinarily used in like cases by other doctors in good standing practicing in that same specialty and who hold the same national board certification. *Chapel v. Allison*, 241 Mont. 83, 89-90, 785 P.2d 204, 208 (1989); *see Glover v. Ballhagen*, 232 Mont. 427, 430, 756 P.2d 1166, 1168 (1988); *Aasheim v. Humberger*, 215 Mont. 127, 130-131, 695 P.2d 824, 826 (1985).

Here, Plaintiffs are entitled to partial summary judgment on the elements of duty and breach because they have proven these two elements of their medical malpractice claims for negligent breach of the duty of attention and care as a matter of law, and there are no disputed fact issues surrounding Dr. Borgenicht's breach of the duty of attention and care she owed to Doris Rowe, as discussed below.

B. Plaintiffs' Expert Opinion.

Plaintiffs have established Dr. Borgenicht's breach of the duty of attention and care through the sworn expert opinion of Dr. Kathryn Locatell, M.D. Her opinion is based on a reasonable degree of medical probability and a more likely than not standard (SOF, Ex.1 at 14 and at 13 ¶ 51 (June 13, 2011)). Dr. Locatell's education, training and experience qualify her as an expert in this matter *(Id.*, 1 ¶ 1):

- Currently licensed as a California physician, since 1986;
- Currently board certified in internal medicine (since 1988) and geriatric medicine, (since 1994 with recertification in 2004);
- Currently serving as an attending physician for nursing home residents, since 1993;
- Current medical consultant to the State of California Department of Justice, Bureau of Medi-Cal Fraud and Elder Abuse, responsible for inspecting nursing homes and conducting forensic analyses of cases of suspected elder abuse;
- Current medical consultant to The United States Department of Justice, Civil Rights Division, responsible for inspecting nursing homes to evaluate whether the care provided to residents generally conforms with generally accepted standards of quality;
- Nursing home medical director for 12 years, through 2006; and
- Clinical professor of medicine at University of California, Davis Medical Center for 12 years, from 1996 – 2008, responsible for teaching nursing home medicine to physician trainees.

Dr. Locatell opines that Dr. Borgenicht committed multiple incidents of gross professional negligence and neglect, breaching many applicable standards of care for physicians attending nursing home patients, such as Doris Rowe. SOF, Ex. 1, 9 ¶¶ 32-33 (June 13, 2011), and Ex. 2, 5-6, Def.'s Resp. to Req. for Admis. No. 24 (Mar. 2, 2011). With respect to Plaintiffs' contention surrounding Dr. Borgenicht's breach of the duty of attention and care, or medical

abandonment, Dr. Borgenicht "failed to visit, examine or devise a medical plan of care for Mrs. Rowe within an acceptable time frame." SOF, Ex. 1, 9, ¶ 34. Other breaches of the standard of care include the following:

- The first time Dr. Borgenicht saw her patient was on May 29 (SOF, Ex. 2, 5-6, Def.'s Resp. to Req. for Admis. No. 24 (Mar. 2, 2011)), weeks after Mrs. Rowe was admitted, and a time at which Mrs. Rowe's condition had seriously declined. *Id.* at 9, Def.'s Resp. to Req. for Admis. No. 41. But instead of investigating the cause of her patient's decline (Borgenicht's own negligent prescribing), and participating in planning Mrs. Rowe's treatment while at Evergreen (which would have been possible only if she had actually seen her patient), she began discussing "end of life" care with the family. SOF, Ex.1, 9-10 ¶¶ 35-36.

- Dr. Borgenicht should have discontinued metoclopramide immediately, which was unlikely to benefit Mrs. Rowe, but well-known to pose a high risk of serious complications in the elderly including tremors. But Dr. Borgenicht did not visit her patient timely, evaluate her condition to ensure that Mrs. Rowe's tremors did not worsen (which they had), or adjust her medication regimen. *Id.* at 10 ¶ 38.

- Dr. Borgenicht also failed to evaluate the effect another new drug, Cymbalta, had on her patient. The prescribing information warns that care should be exercised in treating the elderly with this drug – "a fact Dr. Borgenicht knew or should have known as a geriatrician." *Id.* at 10 ¶ 39.

  Here, Cymbalta was prescribed in addition to trazadone, (SOF, Exhibit 2, pp. 6-7, Borgenicht's Response to Requests for Admis. Nos. 27 and 29) and in addition to the risk of serotonin syndrome, pointed out by the Evergreen pharmacist. SOF, 6 ¶ 15; *and see* SOF, Ex. 1, 6 ¶ 20. It also had the potential side effect of a drop in blood pressure upon standing, which can greatly increase the risk of falling. *Id.* at 10 ¶ 39. Further, a common side effect of the drug is nausea, which Mrs. Rowe complained of, but which was never investigated, but should have been considered, by Dr. Borgenicht. *Id.*

- Dr. Borgenicht failed to acknowledge the pharmacist's report of the possible drug interactions, and a nurse notes that when s/he asked "Dr. B" about the drug interaction "she was not concerned." *Id.* at 6 ¶ 22. In violation of generally accepted professional standards, Dr. Borgenicht failed to document a review of Mrs. Rowe's medication regimen, even after being prompted by Evergreen's nurse, who questioned her about the pharmacist's recommendations. *Id.* at 12 ¶ 45.

- Without ever seeing or evaluating her patient, Dr. Borgenicht increased Mrs. Rowe's trazadone by 50%. She failed to consider potential adverse effects of the drug, which included sedation, which occurred. The combination of the side effects from metoclopramide, trazadone, and possibly Cymbalta, all caused Mrs. Rowe's preventable physical decline, which was evident on May 29, and preventable, had Dr. Borgenicht provided timely and adequate care. *Id.* at 11 ¶ 41.

- Dr. Borgenicht failed to adequately evaluate her patient's condition and review all changes on June 5, the only other time she actually saw her patient at Evergreen. In this case, that would have meant (1) reviewing the June 1 fall; (2) the subsequent episode of non-responsiveness after the fact, which is indicative of a closed-head injury; and (3) Mrs. Rowe's drugs regimen. *Id.* at 11 ¶ 42. The standard of care requires as much, and in this case, there were two significant changes in Mrs. Rowe's condition that needed Dr. Borgenicht's attention: the actual fall on June 1, and Mrs. Rowe's unresponsive episode on June 2. *Id.* at 11 ¶ 43. And although the standard of care requires that an attending physician address her resident's falls – both (1) the risk factors for the falls, and how such risk factors might be mitigated; and (2) the after-effects of any fall, Defendant Borgenicht did neither. *Id.* at 11 ¶ 44.

- Dr. Borgenicht's patient, Doris Rowe, was prescribed numerous medications in combination – drugs which, even alone increased Mrs. Rowe's risk for falling:

  Cymbalta – increased her risk for falling, without any apparent benefit to Mrs. Rowe (*Id.* at 10 ¶ 39; and 11 ¶ 45);

  Trazadone – in addition to the potentially fatal "serotonin syndrome" pointed out by Evergreen's pharmacist (*Id.* at 6 ¶ 20), this drug, too, increased Mrs. Rowe's risk for falling, yet Dr. Borgenicht increased it by 50% without ever seeing or evaluating her patient (*Id.* at 11 ¶ 41);

  Benzotropine – may also increase an older persons' risk for falling (*Id.* at 11-12 ¶ 45);

  Metoclopramide – may increase the risk of falls because of increased tremors. *Id.* at 10 ¶ 38).

- Dr. Borgenicht significantly breached the standard of care by not evaluating or even considering whether Mrs. Rowe suffered a closed head injury in the June 1 fall that was followed by Mrs. Rowe's "unresponsive"

episode on June 2. *Id.* at 12 ¶ 46 (Dr. Locatell's opinion is that this was an "outrageous failure" on Dr. Borgenicht's part). Had her patient suffered an anatomical brain injury, it would have impacted on Mrs. Rowe's prognosis, goals of care, and future care needs, and care could have been taken to prevent any future falls (Mrs. Rowe had three more documented falls). *Id.*

- Nor did Dr. Borgenicht visit or evaluate Mrs. Rowe after her other documented falls on June 11 and June 12. After three falls, a physician's involvement was necessary. "Considering that Dr. Borgenicht was physically present in the building and signed a recertification for Mrs. Rowe on that date, it was an outrageous deviation for her not to have seen and examined the patient on June 12." *Id.* at 12 ¶ 47.

Clearly, Dr. Borgenicht abandoned her patient and refused to properly evaluate her. Dr. Borgenicht was Doris Rowe's physician; none of the Evergreen defendants were medical doctors and could act only through Dr. Borgenicht's orders. In this regard, Dr. Borgenicht has admitted under oath that Evergreen carried out all of the orders she gave:

> INTERROGATORY NO.5: Did you ever give an order relating to Doris Rose that was not carried out by Evergreen Bozeman Health and Rehabilitation Center's agents or employees, including its nurses? If so, please state those instances, by listing the type of order you had given, the reason you gave the order, the date you gave the order, the date you discovered the order had not been carried out, and a description of any steps or actions you took, if any, in such failure to carry out your orders.
>
> ANSWER: No.

(SOF, Ex. 4, 5, Def.'s Supp. Resp. to Interrog. No. 5 (Oct. 19, 2011).

The record further demonstrates the numerous occasions when Evergreen attempted to get Dr. Borgenicht's attention concerning Mrs. Rowe's decline, to no avail:

- A licensed nurse documented that Mrs. Rowe was "lethargic" and that she had become more lethargic since the increase in trazadone (SOF, Ex. 1, 4 ¶ 13);

- Another nurse noted that she had faxed Dr. Borgenicht that Mrs. Rowe now needed stand-by assistance to the toilet (*Id.*); and
- Still other nurse's notes documented that Mrs. Rowe was "sluggish;" "sleeping most of the day;" and unsteady walking since Dr. Borgenicht increased her trazadone. *Id.* at 4 ¶ 13.

The undisputed evidence establishes Dr. Borgenicht's neglect and indifference to her patient's worsening condition:

- A nurse notes on June 6 in a late entry for June 5 that when s/he asked "Dr. B" about Mrs. Rowe's drug interaction "she was not concerned" (*Id.* at 6 ¶ 22; *and see* Ex. 1, Locatell Ex. B-16; and
- In a subsequent narrative entry (time: 12 noon), on June 12, a nurse documented that Dr. Borgenicht was in the facility "on rounds" when she informed Dr. Borgenicht of Ms. Rowe's fall that morning. According to this nurse, Dr. Borgenicht "had [no] comment regarding the falls." SOF, Ex. 1, 7 ¶ 25; *and see* Ex. 1, Locatell Ex. B-19.

None of the above-described evidence has been controverted by Dr. Borgenicht.

C. The Parties' Burdens of Proof.

As the moving party, Plaintiffs have met their initial burden to prove that no genuine issues of material fact exist regarding the elements of duty and breach. *Smith v. Burlington Northern and Santa Fe Ry. Co.*, 2008 MT 25, ¶ 10, 344 Mont. 278, 187 P.3d 639. And, while determining whether Dr. Borgenicht neglected Mrs. Rowe is a fact-based issue, questions of fact can be determined as a matter of law where reasonable minds can come to but one conclusion. *Brohman v. State*, 230 Mont. 198, 202, 749 P.2d 67, 70 (1988). Plaintiffs met their burden of proof by presenting a detailed Statement of Uncontroverted Facts with properly authenticated summary judgment evidence, including the Affidavit of Kathryn Locatell, MD, with CV and attached exhibits and stipulated discovery material, and business record affidavits authenticating those exhibits attached as evidence to Locatell's Affidavit. Dr. Borgenicht failed to object to the

form or substance of any of Plaintiffs' summary judgment evidence, nor did she controvert any of Plaintiffs' Statement of Uncontroverted Facts.

Having met their burden, the burden has shifted from Plaintiffs to Dr. Borgenicht to prove, by more than mere denial and speculation, that a genuine issue does exist. *First Security Bank of Anaconda v. Vander Pas*, 250 Mont. 148, 152, 818 P.2d 384, 386-387 (1991). The burden rests squarely with Dr. Borgenicht; the Court has no duty to anticipate possible proof that might be offered under the pleadings. *See Silloway v. Jorgenson,* 146 Mont. 307, 310, 406 P.2d 167, 169 (1965). To satisfy her burden, Dr. Borgenicht has "an affirmative duty to respond by affidavits or other sworn testimony containing material facts that raise genuine issues; conclusory or speculative statements will not suffice." *Koepplin v. Zortman Mining, Inc.*, 267 Mont. 53, 58-59, 881 P.2d 1306, 1309 (1994); *see* Rule 56(e), M.R.Civ.P.; *see Saucier,* ¶ 34. Moreover, the facts must be of a substantial nature. *Brothers v. General Motors Corp.*, 202 Mont. 477, 481, 658 P.2d 1108, 1110 (1983); *see also Carelli v. Hall*, 279 Mont. 202, 208, 926 P.2d 756 (1996) (Opposing party must present "affirmative evidence of a material and substantial nature raising genuine issues of material fact."). Self-serving testimony in the face of overwhelming evidence to the contrary is insufficient to create a dispute as to an otherwise indisputable fact. To withstand summary judgment, therefore, Dr. Borgenicht must demonstrate specific facts "and cannot simply rely upon [her] pleadings, nor upon speculative, fanciful, or conclusory statements." *Thornton v. Songstad*, 263 Mont. 390, 398, 868 P.2d 633, 638 (1993) (citations omitted); *see also* Rule 56(e)(2), M.R.Civ.P. ("...an opposing party may not rely merely on allegations or denials in its own pleading; rather, its response must -- by affidavits or as otherwise provided in this rule -- set out specific facts showing a genuine issue for trial.")

But, Dr. Borgenicht has failed to identify any specific facts in opposition to Plaintiffs'

Motion. Aside from her legal argument, Dr. Borgenicht's response consisted of a reference to her denial in her Answer, her denial to a request for admission, and a two-sentence, conclusory, affidavit she filed after Plaintiffs' reply which states:

> 1. I am board certified in internal medicine and geriatrics, licensed to practice in the State of Montana and have practiced medicine for more than 30 years.
>
> 2. My care and treatment of Doris Rowe met the applicable standard of care for an internist and geriatrician.

Aff. Def. K. Borgenicht (August 8, 2011).

D. Plaintiffs' Objections to Dr. Borgenicht's Summary Judgment Evidence

As pointed out by Plaintiffs, Dr. Borgenicht's response is deficient and fails to create a genuine issue of material fact, for several reasons. First, Rule 56(e)(2), M.R.Civ.P., forbids a defendant from relying on a denial in her answer to defeat summary judgment. Second, a party's reliance on her own denial to a request for admission is not competent summary judgment evidence to raise a genuine issue of material fact. *Sandone v. Dallas Osteopathic Hosp.*, 331 S.W.2d 476, 479 (Tex. Civ. App.--Amarillo 1959). A mere denial is insufficient. *See Saucier*, ¶ 34 (internal citation omitted). Noting these deficiencies, Plaintiffs have moved to strike Dr. Borgenicht's evidence on the following grounds: hearsay, lack of foundation, Dr. Borgenicht's failure to disclose herself as an expert witness, Dr. Borgenicht's failure to make a requisite showing of personal knowledge, and her failure to make a factual showing for her denials which renders her opinions speculative and conclusory.

During summary judgment proceedings, the parties must limit their evidence to what would be otherwise admissible pursuant to the rules of evidence. *Hiebert* v. *Cascade County*, 2002 MT 233, ¶ 29, 311 Mont. 471, 56 P.3d 848. The Court sustains Plaintiffs' objections to Dr.

Borgenicht's summary judgment evidence. Dr. Borgenicht's denial in her Answer is not competent summary judgment evidence and does not raise a genuine issue of material fact. *See* Rule 56(e)(2), M.R.Civ.P. Likewise, Dr. Borgenicht's denial to a request for admission does not create a disputed fact issue. *See Sandone,* 331 S.W.2d at 479; *see Saucier,* ¶ 34 (internal citation omitted). Finally, her two-sentence, bare bones affidavit, is hopelessly conclusory, provides zero factual basis, fails to establish that it is based on personal knowledge, and is incompetent summary judgment evidence. *See, c.f.* Rule 56(e), M.R.Civ.P.; *see Ponderosa Pines Ranch, Inc. v. Hevner*, 2002 MT 184, ¶ 24, 311 Mont. 82, 53 P.3d 381 ("Mere denials will not prevent an order for summary judgment.") (citing *Bruner v. Yellowstone County,* 272 Mont. 261, 264, 900 P.2d 901, 903 (1995)). As such, Dr. Borgenicht's two-sentence affidavit fails to raise a genuine issue of material fact regarding her neglect:

> An affidavit submitted in a summary judgment proceeding must be based on the affiant's personal knowledge of the facts set forth. Rule 56(e), M.R.Civ.P. If an affidavit does not comply with the requirements of Rule 56(e), it does not raise a genuine issue of material fact as a matter of law.

Smith v. Burlington N. & Santa Fe Ry. Co., 2008 MT 225, ¶ 41, 344 Mont. 278, 187 P.3d 639 (internal citations omitted).

For these reasons, this Court disregards Dr. Borgenicht's proffered summary judgment "evidence." Further, there being no genuine issue of material fact as to Dr. Borgenicht's medical neglect of Mrs. Rowe, Dr. Borgenicht has also failed to establish that judgment as a matter of law should not be granted.

Nor is this the kind of case where a genuine issue can be established by evidence "on file." *See e.g. Hopkins v. Superior Metal Workings Systems, L.L.C.*, 2009 MT 48, ¶¶ 7, 14, 349 Mont. 292, 203 P.3d 803. That is because in this case there is no such evidence "on file." *See id.*

Dr. Borgenicht failed to present any evidence that would raise a genuine issue of material fact, nor did she indicate any part of the record that could raise a genuine issue of material fact. In this case—unlike *Hopkins*—there simply is no evidence on file for the Court to consider.

Thus, having failed to meet her burden in opposing Plaintiffs' Motion, summary judgment for the Plaintiffs on the issues of duty and breach is proper. *Palin v. Gebert Logging, Inc.*, 220 Mont. 405, 407, 716 P.2d 200, 202 (1986).

E. Conclusion—Plaintiffs' Partial Summary Judgment Re: Medical Neglect

Here, Plaintiffs' Statement of Uncontroverted Facts proves Plaintiffs' entitlement to partial summary judgment on Dr. Borgenicht's neglect of Mrs. Rowe. It is undisputed that Mrs. Rowe was Dr. Borgenicht's patient during the time period in question. SOF, Ex. 2, Def.'s Resp. to Admis. Nos. 11 and 12 (Mar. 2, 2011). Dr. Borgenicht failed to fulfill her duties to Mrs. Rowe, breaching the standards of care illustrated above by refusing to see, examine, treat or follow up with her as Mrs. Rowe's condition demonstrably deteriorated from her lack of care. SOF, Ex. 1, 5 ¶ 16 (June 13, 2011). The uncontroverted facts establish as a matter of law that:

(1) Dr. Borgenicht was Doris Rowe's physician and, therefore, owed her corresponding duties; and

(2) That Dr. Borgenicht breached those duties.

The summary judgment evidence establishes as a matter of law that Dr. Borgenicht did not see or evaluate her patient at a time when medical care was necessary. *Id.* at 4 ¶ 16, referencing Ex. B-12 to Dr. Locatell's report.

As such, reasonable minds can reach only conclusion: Dr. Borgenicht's behavior amounted to medical neglect of her patient. *See Brohman,* 230 Mont. at 202, 749 P.2d at 70. For these reasons, summary judgment on the issue of Dr. Borgenicht's medical neglect is GRANTED in

Plaintiffs' favor, with one exception.

Plaintiffs request this Court find that Dr. Borgenicht's medical neglect proximately caused Doris Rowe's numerous injuries. SOF, Ex. 1,¶¶ 51, 53. Negligence cases where the issue of causation is in dispute are rarely amenable to summary judgment because it is axiomatic that questions of causation are for the finder of fact to decide. *Vincelette v. Metropolitan Life Ins. Co.*, 273 Mont. 408, 411, 903 P.2d 1374, 1376 (1995) (internal citation omitted).

This Court reasonably infers a genuine issue of fact regarding causation from the presence of settled Evergreen defendants, to whom Dr. Borgenicht now attributes fault. *See Saucier*, ¶ 33. Further, while Plaintiffs' expert undisputedly establishes the applicable standards of care and Dr. Borgenicht's breaches thereof, this may not be the case with respect to causation. This Court is not wholeheartedly persuaded that reasonable minds could only reach the conclusion that Dr. Borgenicht's failures, alone, caused Doris Rowe's death. Even Plaintiffs' expert opinion does not unequivocally establish that Dr. Borgenicht alone is responsible: "Each of the failures caused harm and also contributed in some fashion to the outcome Ms. Rowe ultimately suffered." *See, e.g.* Plaintiffs' SOF, Ex. 1, ¶ 51 (emphasis added). It is also unclear whether Plaintiffs contend that Dr. Borgenicht is the sole cause of Mrs. Rowe's death.

Therefore, Plaintiffs' request for partial summary judgment against Dr. Borgenicht on the issue of causation is DENIED.

IV. Plaintiffs' Motion Barring Reduction of Plaintiffs' Verdict.

Plaintiffs contend that Dr. Borgenicht is not entitled to have the jury apportion negligence to any of the settled defendants because Dr. Borgenicht has not properly pled the negligence of settling/released parties as a defense. Dr. Borgenicht responds that she pleaded the defense of contribution in her Answer and, regardless, she filed a Notification asserting her defense of the

negligence of others which cured any defect in her Answer.

Under Montana law, a non-settling defendant may benefit from a plaintiff's settlement by following the procedures outlined in the comparative fault statute, § 27-1-703, MCA. With regard to this statute, the Montana Supreme Court has stated:

> Generally, § 27-1-703, MCA, provides the statutory scheme for determining liability among multiple tortfeasors. Section 27-1-703(6)(a), MCA, provides that, in an action based on negligence, a defendant may assert as a defense that the plaintiff's damages were caused in full or in part by a party with whom the plaintiff has settled. The trier of fact must consider the liability of any settled party. Section 27-1-703(4), MCA. The plaintiff assumes any liability allocated to the settled party and the claim is reduced by the percentage of the settled party's equitable share of the obligation. Section 27-1-703(6)(d), MCA.

Hulstine v. Lennox Indus., 2010 MT 180, ¶ 18, 357 Mont. 228, 237 P.3d 1277. Subsection (6) requires a defendant to actually assert such a defense; and, once asserted, a defendant then has the burden of proving (i) the negligence of the settled parties, (ii) the applicable standard of care, and (iii) causation. § 27-1-703(6)(a)-(f), MCA.

Dr. Borgenicht's June 14, 2010 answer did not specifically allege that the negligence of any of the Evergreen entities caused any of the Plaintiffs' alleged injuries, in whole or in part. Instead, Dr. Borgenicht pleaded the following:

> This Defendant has the right of contribution from any other person, including persons who have settled with or who have been released by Plaintiffs, whose negligence may have contributed as a proximate cause to the injury claimed of by Plaintiffs should they recover against this Defendant as provided by § 27-1-703, M.C.A.

Answer at 2, Affirmative Defense 3.

The parties mediated on July 1, 2010 but did not settle. Plaintiffs eventually settled with the Evergreen entities, including Dr. Borgenicht — but only in her capacity as Evergreen's

Medical Director. They specifically reserved all claims against Dr. Borgenicht as Doris Rowe's personal (attending) physician. Stipulated Dismissal and Order (Sept. 16, 2010).

On December 15, 2010, Dr. Borgenicht filed a "Notification to Settled/Released Entities...[1] Pursuant to § 27-1-703,(6) MCA, of Assertion of Affirmative Defense of Negligence of Settled and Released Party." Def.'s Notification. The Notification asserts that in her Answer, Dr. Borgenicht raised the affirmative defense "that the negligence of Evergreen at Bozeman, LLC, et al, caused Plaintiffs' alleged injuries in whole or in part." *Id.* Dr. Borgenicht served the Notification upon all necessary parties pursuant to § 27-1-703(6)(f), MCA.

Plaintiffs contend that Dr. Borgenicht has failed to plead or offer facts to show the negligence of any of the settling and released parties. They further contend that Dr. Borgenicht failed to plead "settlement" or "release" as specifically required by § 27-1-703(6)(f), MCA:

> (f) A defendant alleging that a settled or released person is at fault in the matter shall affirmatively plead the settlement or release as a defense in the answer. A defendant who gains actual knowledge of a settled or released person after the filing of that defendant's answer may plead the defense of settlement or release with reasonable promptness, as determined by the trial court ...

Id. (emphasis added).

Dr. Borgenicht responds that her burden of proof, as defined by § 27-1-703(6)(e), MCA, is to prove Evergreen was negligent for violating the standard of care which was a contributing cause of Plaintiffs' damages. Dr. Borgenicht further contends that Plaintiffs have failed to offer any legal authority supporting their position that additional facts or proof are required to be pled. Instead, she contends that Plaintiffs are on notice of her assertion of Evergreen's negligence and cannot complain of any surprise resulting in prejudice at this stage of the litigation given

[1] Even here, Dr. Borgenicht did not notify all of the settled and released parties, designating only (1) Evergreen at Bozeman, LLC d/b/a Evergreen Bozeman Health and Rehabilitation Center; (2) EHC Financial Services, LLC, f/k/a Evergreen Healthcare Management, LLC; and (3) EHC Management, LLC.

discovery is still open, the deadline for disclosure of experts has not passed and there is no trial date. Dr. Borgenicht offers to file an amended answer, if the Court deems it necessary.

Rule 15(a), M.R.Civ.P., provides that "leave to amend should be freely given by the district courts." *Griffin v. Moseley*, 2010 MT 132, 356 Mont. 393, 234 P.3d 869 (citing *Upky v. Marshall Mtn., LLC*, 2008 MT 90, ¶ 18, 342 Mont. 273, 180 P.3d 651). "While amendments are not permitted in every circumstance, they may be allowed when they would not cause undue prejudice to the opposing party." *Id.*

It is appropriate and in the interests of justice to allow Dr. Borgenicht an opportunity to amend her Answer to specifically plead an affirmative defense of "settlement" or "release" as required by § 27-1-703(6)(f), MCA. No undue prejudice will result to Plaintiffs, as they were already on notice of Dr. Borgenicht's affirmative defense by way of her Notification filed on December 15, 2010.

With respect to Plaintiffs' Motion seeking denial of Dr. Borgenicht's claim to a potential *pro tanto*, dollar-for-dollar, reduction, this Court reserves ruling on this issue until trial. The question of whether Dr. Borgenicht is entitled to an offset does not need to be decided at this juncture because it only arises in the event a verdict is rendered against Dr. Borgenicht. This issue is not yet ripe. *See Havre Daily News, LLC v. City of Havre*, 2006 MT 215, 333 Mont. 331, ¶¶18-19, 142 P.3d 864 (internal citations omitted).

Further, it is undisputed that Dr. Borgenicht's Answer was filed before the settlement with the other defendants, so the right to an offset could not have been pled at that time. Reserving ruling on this issue allows Dr. Borgenicht to plead which of the six settled and released defendants are responsible for the injuries at stake.

Therefore, Plaintiffs' request for partial summary judgment on this issue is RESERVED.

ORDER

THEREFORE, IT IS HEREBY ORDERED:

1. Plaintiffs' Motion for Partial Summary Judgment Re Defendant Borgenicht's Affirmative Defense #3 – Her Purported Right to Contribution is GRANTED WITH LIMITATIONS, as set forth above.

2. Plaintiffs' Motion for Partial Summary Judgment Against Kathryn Borgenicht, MD Re Medical Neglect is GRANTED IN PART and DENIED IN PART, as set forth above.

3. Plaintiffs' Motion for Partial Summary Judgment, or Alternatively, an Order in Limine, Barring Any Reduction to Kathryn Borgenicht, M.D. per Mont. Code Ann. § 27-1-703 is RESERVED.

4. Kathryn Borgenicht, MD has until **December 16, 2011** to file an Amended Answer to address the deficiencies described above, including but not limited to asserting an affirmative defense of "settlement" or "release" as required by § 27-1-703(6)(f), MCA.

DATED this 21st day of November, 2011.

HON. JOHN C. BROWN
District Judge

cc: Casey Magan/Russell Waddell
Julie Lichte / Herbert Pierce
Paul Collins
John Russell
Greg Murphy

Emailed 11/22/11